Supreme Court, U.S.
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No. 85-1679

In The
Supreme Court of the United States
October Term, 1985

DONALD O. DALEY,

Petitioner,

v.

WALTER L. FRANK, individually and as Trustee of the Walter L. Frank, M.D., Ltd. Employees Pension Plan, and JOAN FRANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

Respondents agree with the factual and procedural summary set forth in the Opinion of the United States Court of Appeals for the Ninth Circuit (Pet., App. D, at 2, 3). The Respondents, Walter and Joan Frank, in their personal capacities and Dr. Frank, as representative of the Walter L. Frank, M.D., Ltd. Employees Pension Plan (hereinafter collectively referred to as "the Franks") commenced suit against the Petitioner, his wife and several business enterprises and corporations in the United States District Court for the District of Arizona. The complaint contained twenty-one counts, grounded in alternative theories of fraud and breach of contract.

Prompted by the desire to obtain a judgment upon which they could levy, the Franks moved for summary judgment on the contract counts, and prevailed. On August 20, 1982, they were awarded a judgment, which included fees and costs, of $518,389.00. In order to achieve finality, the Franks stipulated that the remaining counts could be dismissed, with prejudice.

On February 11, 1983, Petitioner filed a voluntary Chapter 7 bankruptcy proceeding in the District of Arizona. The Franks commenced an adversary proceeding, seeking a declaration that the debt evidenced by their judgment was nondischargeable pursuant to 11 *U.S.C.* §§ 523(a)(2), (4), and (6).

Instead of filing an answer, Petitioner moved for dismissal or, alternatively, that summary judgment be entered pursuant to F.R.Civ.P. 12(b)(6). The bankruptcy court granted the motion to dismiss and ruled that the

dismissal with prejudice, in the pre-bankruptcy district court action, constituted a *res judicata* bar on the nondischargeability issues. The district court, on the same basis, affirmed. The United States Court of Appeals for the Ninth Circuit, relying on this Court's decision in *Brown v. Felsen,* 442 U.S. 127 (1979), reversed the lower courts and remanded the matter for trial.

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REASONS FOR DENYING THE WRIT

1. The Standard of Review Was Properly a De Novo Review, Not The "Clearly Erroneous" Standard.

Neither the bankruptcy court nor the district court granted Petitioner's Motion to Dismiss on any basis other than the legal principle that the Franks were barred, by the doctrine of *res judicata,* from raising fraud-related issues in the bankruptcy court. *See,* Pet., App. A at 2-4; C-7. Indeed, findings of fact were not made by the bankruptcy court, since sufficient fact issues were raised by the pleadings to require an evidentiary hearing, thereby precluding entry of summary judment. Pet., App. D-9, n.8.[1] Therefore, since no factual findings were made, nor

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[1]Moreover, as the district court stated in its opinion, "Plaintiff's final argument that general issues of material fact exist as to whether they were defrauded by Daley is irrelevant. This conclusion follows the determination that the doctrine of res judicata precludes the Franks from bringing to the bankruptcy court the fraud claims they had previously stipulated would be dismissed with prejudice." Pet., App. C-7.

indeed, could have been made under F.R.Civ.P 12(b)(6) on the state of the record,[2] the lower courts ruled on the issues presented solely as matters of law.

Thus, the "clearly erroneous" standard of Bankruptcy Rule 8013, and F.R.Civ.P. 52(a) is not applicable, since conclusions of law are subject to *de novo* review. *In re Bialac*, 712 F.2d 426 (9th Cir. 1983); *In re Missionary Baptist Foundation of America*, 712 F.2d 206 (5th Cir. 1983). The United States Court of Appeals for the Ninth Circuit applied the correct standard of review to the legal principle which had been decided by the lower courts.

2. This Court's Decision in Brown v. Felsen has Been Followed by Courts in Every Circuit, and Petitioner Has Cited No Authority to the Contrary.

The United States Supreme Court, in *Brown v. Felsen*, 442 U.S. 127 (1979) held that the principle of *res judicata* did not apply to preclude a bankruptcy court from deciding dischargeability issues. *Id.* at 138-139. That decision followed the 1970 amendments to the Bankruptcy Act, 11 *U.S.C.* § 35.[3] The Bankruptcy Act was amended to insure exclusive federal control in the bankruptcy courts over all actions which sought to determine the viability of a debt discharged in a bankruptcy proceed-

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[2]See, Pet., App. D-9, n.8.

[3]§ 523 of the present Bankruptcy Code, 11 *U.S.C.* § 523 (effective October 1, 1979) is the successor provision to 11 *U.S.C.* § 35 (referred to in the cases as § 17 of the Bankruptcy Act), and for all material purposes, the provisions are similar.

ing. Before the 1970 amendments, a bifurcated system had allowed state courts to rule upon the nondischargeability of particular obligations, a practice which had led to abuse by creditors. Claims which should have been justly barred by a bankruptcy discharge were nonetheless pursued in state courts, which courts lacked adequate knowledge of federal bankruptcy law, while debtors were misled into believing that the suits had been nullified by their bankruptcy discharge. *See* S.REP. No. 91-1173, 91st Cong., 2d Sess., 6, 9 (1970); H.R. REP. No. 91-1502, 91st Cong., 2d Sess., 8 (1970). *See also In re Fulwider*, 624 F.2d 908, 909-10 (9th Cir. 1980); *In re Eskenazi*, 6 B.R. 366, 368 (9th Cir. BAP 1980); 3 COLLIER ON BANKRUPTCY § 523.11 at 523-74 (15th ed. 1985); 1B J. MOORE'S FEDERAL PRACTICE ¶ 0.419 [3.-4] (2d ed. 1985).

Since *Brown v. Felsen*, federal courts in every circuit have followed its mandate.[4] *See e.g., In re Comer*, 723 F.2d 737 (9th Cir. 1984); *Lovell v. Mixon*, 719 F.2d 1373 (8th Cir. 1983); *Carey Lumber Co. v. Bell*, 615 F.2d 370, 377 (5th Cir. 1980) (adopting district court decision); *Matter of Ross*, 602 F.2d 604 (3rd Cir. 1979); *In re Helm*, 48 B.R. 215 (Bankr. W.D. Ky. 1985); *In re Marks*, 40 B.R. 614 (Bankr. D.S.C. 1984); *In re Drayer*, 29 B.R. 831, 833 (Bankr. D. Mass. 1983); *In re Gilbride*, 32 B.R. 75 (Bankr. S.D. Fla. 1983); *Matter of Life Science Church*, 34 B.R. 529 (Bankr. N.D. Ind. 1983); *In re Black*, 18 B.R. 534 (Bankr. D.N.M. 1982); *In re Greenblatt*, 8 B.R. 994, 996 (Bankr. E.D. N.Y. 1981).

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[4]Federal courts have recognized that while *res judicata* is not appropriate to bar bankruptcy court inquiry into nondischargeability issues, principles of collateral estoppel may be of assistance on certain underlying factual determinations. *See, e.g. Lovell v. Mixon*, 719 F.2d 1373 (8th Cir. 1983).

The United States Court of Appeals for the Ninth Circuit has not deviated from the clear precedent of *Brown v. Felsen,* nor has it rendered a decision in conflict with another federal court of appeals on the same matter. Instead, it has reaffirmed a fundamental principle of bankruptcy law, that debts created by tort or other wrongful conduct should be determined on the merits, by a court with exclusive jurisdiction over the issues.

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CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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